No. 393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN JR., a Minor, and MARY RYAN, a Minor, by their Guardian *ad litem* MARY AGNES RYAN,

Plaintiffs in Error,

vs.

C. J. SMITH, as Receiver, etc., of the Oregon Improvement Company, a Corporation,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

P. REDDY,
J. C. CAMPBELL AND
W. H. METSON,
Attorneys for Plaintiffs in Error.

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Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case comes to this Court on a writ of error to the Circuit Court of the United States for the Northern District of California (Record, p. 89) to reverse the final judgment of that Court (Record, p. 17), which judgment was in favor of the defendant in error, and against the plaintiffs in error. The case was tried by a jury, who rendered a verdict for the defendant in error. (Record, p. 16.)

The plaintiffs in error, during the progress of the trial, excepted to certain rulings of the Court, as specified in the assignment of errors. (Record, pp. 64-74.)

The plaintiffs in error in their complaint (Record, p. 3)

allege, in substance, that the Oregon Improvement Company was a corporation, organized and existing under and by virtue of the laws of the State of Oregon; that on the 7th day of October, 1895, and for a long time prior thereto, the said corporation was the owner of and operated and controlled a system of railroads, steamships, and other vessels, and owned and operated coal mines situate in the States of California, Oregon and Washington; that C. J. Smith was duly made and appointed receiver of said corporation, with power to operate and manage its business; that on the 7th day of October, 1895, said C. J. Smith duly qualified and entered upon the discharge of said duties, and is now receiver; that on the 13th day of March, 1896, one Charles Ryan was employed by said defendant in his capacity of receiver, and was engaged, under the direction of said receiver, in assisting unloading coal from a certain vessel known and called the bark "Empire," then and there in the possession and use of said receiver in the City and County of San Francisco, State of California; that said Charles Ryan was required, in the performance of his duties, to stand upon a platform on said vessel "Empire," and when a large tub or bucket containing coal was hoisted, to take hold of the "tail" or rope attached to said tub and dump it; that said defendant negligently failed to furnish said tub with a "tail" of sufficient strength for the purpose for which it was used, so that when said Charles Ryan took hold of the same on said day, in the usual and ordinary manner, the said "tail" broke and gave way, and by reason thereof the said Charles Ryan was caused to fall, and was precipitated down an open hatchway on said vessel a distance of forty-five feet, and received injuries from which he died

on the same day; that said Charles Ryan received said injuries, resulting in his death as aforesaid, solely by reason of the negligence of said defendant in providing and furnishing an unsafe and insecure 'tail" to said tub.

To this complaint the defendant filed his answer (Record, p. 13), in which he denied that he negligently failed to furnish the tub with a "tail" of sufficient strength for the purpose for which it was used, or that said Charles Ryan received the injuries mentioned in the complaint solely or at all by reason of the negligence of defendant in providing an unsafe or insecure "tail" to said tub, or by reason of any negligence of said defendant whatever; and for a further and separate answer, defendant alleged that said Charles Ryan received the injuries mentioned in the complaint by reason of his own negligence directly and proximately contributing to and causing such injuries.

After the testimony for the plaintiffs was all in, the defendant moved the Court to direct the jury to render a verdict for the defendant, and, after argument of counsel, the motion was denied. (Record, p. 29.)

The plaintiffs requested the Court to give a certain instruction t o the jury, which was refused, and not given; nor did the Court embody the same, or any part thereof, in his charge to the jury. (Record, p. 54.)

The Court also gave certain instructions to the jury, to the giving of which the plaintiff excepted. (Record, p.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Now, in the course of this business whose duty "is it to fix those tails?"

II.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know who, in the course of that business, "usually attaches or puts the tails on the tubs?"

III.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. The question is, do you know whose duty it is "ordinarily?"

IV.

The Court erred in denying the motion of plaintiff to strike out the answer made by the witness Paulsen to the question:

"Q. Who does?"

V.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know whether or not Ryan was in the

" habit of attending to the tails on the tubs on which he " worked?"

VI.

The Court erred in overruling the objection to the question asked the witness Hichens:

" Q. State what is the custom of the men in regard to " mending, repairing, or attending to the tails on the " tubs."

VII.

The Court erred in overruling the objection to the question asked the witness Hichens:

" Q. Did you ever see him repairing or arranging the " tails of his tubs?"

VIII.

The Court erred in denying plaintiff's motion to strike oue the answer made by the witness Hichens to the question:

" Q. Do you know how the rope was spliced?"

IX.

The Court erred in overruling the objection of plaintiff to the question asked the witness Hichens:

" Q. Was the splice made in a braid, or in a twist of " the rope?"

X.

The Court erred in overruling the objection of the plaintiff to the question asked the witness Hichens:

" Q. Was, or was not, that an obvious defect?"

XI.

The Court erred in denying the motion of defendant to strike out the answer of the witness Hichens to the question:

"Q. I want you to tell the jury, now, how you know "that that was spliced properly in the first place?"

XII.

The Court erred in charging the jury as follows:

"While it is ordinarily the duty of the master to keep "in repair the appliances with which the servant must "work, still it is not the master's duty to repair defects "arising in the daily use of the appliance, for which "proper and suitable materials are supplied by him, and "which may be easily remedied by the servant without "the help of skilled mechanics for their repair; if, there-"fore you find in this case that the defendant kept on "hand and furnished proper ropes for the making of tails "for the tubs used by it, and which could be had by its "employes upon application therefor, and if you find the "defective condition of the tail used by Ryan at the time "of the accident was discoverable by him by use of ordi-"nary powers of observation and common prudence, I "charge you that it was the duty of said Ryan to have "applied for and obtained from the defendant a proper "rope for the making of a new tail, or to have repaired "the tail upon the tub himself, and that his failure and "negligence to do so was contributory negligence on his "part, by reason of which the plaintiffs in this action "cannot recover."

XIII.

The Court erred in charging the jury as follows:

"The application of the principle of the law is illus-
" trated in this way: Suppose it is the duty of the master
" to furnish a proper donkey engine to the servants who
" are engaged in unloading a vessel, one that is ordinarily
" safe and properly adjusted, and he furnishes an engine
" that is not in proper condition, or that is not safe, and
" the engine explodes, or is subjected to some accident by
" reason of apparent defect which injures one of the serv-
" ants employed in the operation of the business. It is
" the positive duty of the master to supply the servants
" with a proper engine and machinery that is safe, and if
" he fails in that respect the mere fact that the machinery
" was operated by an engineer would not make any differ-
" ence. The master would still be responsible for his
" failure to furnish the proper sort of safe machinery.
" That is the rule that you are to apply in this case with
" respect to this matter, in the view that the master was
" required to furnish proper and safe appliances."

XIV.

The Court erred in charging the jury as follows:

"But, on the other hand, you will consider whether or
" not the duty of keeping this particular tail appliance in
" repair belonged to Mr. Ryan; whether it was the duty of
" Mr. Ryan to see that the tail was in order. While it may
" have been the duty of the master to furnish a safe appli-
" ance, still, if it was to be performed by Mr. Ryan, then
" his negligence in the matter would of course not make

" the principal or master liable. I think I have made " myself understood. If Mr. Ryan was to take care of " these tails, and see that they were in safe condition, and " when they became unsafe, he was to substitute " new ones, and that was his duty, then of course the mas- " ter would not be responsible for the failure on his part " whereby he was injured."

XV.

The Court erred in charging the jury as follows:

" Now, then, the dumpers were the servants working " together in the handling of the tubs, so the testimony " tends to show, and who knew of each other's work and " labor, and had an opportunity to observe each other's " conduct. They were fellow-servants in that respect. " They would be fellow-servants in bringing the tub to its " place on the platform where it was to be discharged, " and in emptying it. They would be fellow-servants in " that respect. But if one of these servants—Mr. Ryan, for " instance—had the exclusive duty of keeping these tails " in repair, a duty that belonged particularly to the " master, and he should fail in that respect, his failure " could not be that of a fellow-servant with respect to " others. But you will observe in respect to this matter " that to bring the principals into play in this case, you " must find that some other servant handled this tail and " kept it in repair, and by reason of that fellow-servant's " conduct, the tail became unfit for its use, or its attach- " ment became imperfect. If that was the work of some " other servant, not Mr. Ryan, and that person was acting

"as the agent of the master in putting the tail in that "position, and in keeping it in repair, then of course the "master would be responsible for its failure in that re- "spect, and the plaintiffs would be entitled to recover in "this case. But you will observe that the keeping of this "tail in repair was a matter that continued from time to "time, and it was a matter that might be required to be "performed on one day and another day and on another "tail. So that this keeping of the tail in repair, if "you believe it was a continuous duty required to "be performed by these servants engaged in this business "from day to day, and was a matter in which they be- "came fellow-servants, then the master was not responsi- "ble for their failure as fellow-servants to keep it in re- "pair. It is only in the view that some fellow-servant is "charged with that specific duty to the exclusion of the "other, and in that respect represented the master, that "the master would be held responsible for the conduct "of the servant."

XVI.

The Court erred in charging the jury as follows:

"If, therefore, you find in this action that the defective "condition of the tail of the tub used by Ryan at the time "of the acicdent was due to the carelessness or negligence "of one of the fellow-servants or co-employes of the said "Ryan, employed by the defendant in the same general "business as the said Ryan, in failing or neglecting to "keep the said tail in proper condition or repair, then I "instruct you that the negligence of the said fellow-ser- "vant or co-employe of the said Ryan in that regard was

" not negligence upon the part of the defendant, and that " the plaintiff cannot recover in this action."

XVII.

The Court erred in charging the jury as follows:

" In this case, the question relates to the tail attached " to this tub. The persons having to do with that tub " were those servants or employes who handled it here at " the wharf or vessel. The testimony tends to show that " it was the duty of those who were engaged in dumping " those tubs to see to it that the tails were kept in order. " If that is true, those people who are charged with the " duty were fellow-servants, and the master was not re- " sponsible for the conduct of such persons, because one " person could observe the conduct of another and know " how the other acted, and know whether he attended to " his duty or not. So I say that such persons would be " considered as fellow-servants in such an employment."

XVIII.

The Court erred in charging the jury as follows:

"I have said something to you about the duty of the " master. It is sometimes the duty of the master to pro- " vide certain machinery and appliances, and to be re- " sponsible with respect to those things. It is the duty " of the master to see that they are in order, and it is a " positive duty which cannot be performed by a servant " in such a way as to absolve the master from responsi- " bility. But you must observe in such case it is where " one servant is injured by the failure of the master to

"provide some appliance or some machinery, but the "master may have developed upon a servant to provide "those appliances. You can very well understand that. "The master might say he would have a servant look after "the machinery, or provide ropes and see that they were "in order. That duty may be performed by the master "through his servant, and if that servant fails to keep "them in order and is injured thereby, the representa- "tives of such a servant cannot claim damages for his "neglect to keep those things in order, although it is a "matter which devolves upon the master primarily. In "this case, if the master had made provision, of if there was "a custom that these dumpers should keep these tails in "order, then it might be said in one sense that that was "the duty of the master. Nevertheless, if it was devolved, "as it might very properly be devolved, upon the servant, "and if he then failed to keep the appliance in order and "suffered therefrom, he would have no recourse against "the master. It would be his own fault."

XIX.

The Court erred in charging the jury as follows:

"In this case there was some testimony that it was "Ryan's duty to keep these tails in order. If you believe "the testimony that it was his duty to keep them in order, "and that they hung up there in the engine-room where "they could easily be obtained, then neither he nor his "representatives could recover for any damage arising "therefrom."

XX.

The Court erred in charging the jury as follows:

"A master may devolve a duty upon more than one "servant, as, for instance, upon two or three dumpers. "Then those men working together in that way and per- "forming that duty are fellow-servants; they become "fellow-servants even in such duty, that is to say, in keep- "ing the apparatus in repair, and if there is a failure on "the part of one of these servants to keep the appliance "in order, then the master is not responsible for it. It is "the duty in which the fellow-servant has assumed the "responsibility of his fellow-servant's conduct."

XXI.

The Court erred in refusing to charge the jury as follows:

"That it is the duty of the master not only to furnish "safe appliances, but that that duty is a continuing one; "that it is his duty to see that at all times those appli- "ances are kept in reasonably safe condition, and that "he is bound to make a proper inspection of those appli- "ances, and that if he fails to make that inspection he is "guilty of neglect; and that where a defect would be ap- "parent upon a reasonable inspection, and it is allowed "to continue, it is presumed that no inspection is made, "and the master is liable."

XXII.

The Court erred in charging the jury as follows:

"I have already instructed you, gentlemen, that the

"duty of the master with respect to certain matters will "be a continuing duty; but I have also instructed you "that he may devolve that continuing duty upon a serv- "ant to perform, and that if the servant, or any of his "fellow-servants in working together, fails in the per- "formance of that duty, then the master is not responsi- "ble. The point is this: that the servant has in such case "assumed the responsibility of working with his fellow- "servants."

ARGUMENT.

I.

It was error for the Court to charge that the deceased was a fellow-servant of the person or persons upon whom devolved the duty of affixing to the coal tubes new and safe tail ropes in place of the old and worn out ones, and that the defendant was not liable for any injury flowing from the negligence of said person or persons in failing to perform said duty. (Record, p. 71.)

In our view of the case, it is within the rule which holds the master liable for the neglect of his servants in not providing suitable and safe appliances, apparatus, machinery or tools for doing the work, and which the other servants of the company are called upon to use in doing such work. We do not believe the master has performed his full duty when he has delivered to his servants a quantity of apparatus in a separate and detached condition, such detached parts being in a safe condition; or that any negligence in putting such machinery together

and adjusting it on the vessel for the performance of its work is not to be attributed to the master.

A different rule would be in conflict with the spirit, if not the letter, of the doctrine, well established in this Court, as well as in the Courts of other States, and of the Supreme Court of the United States, viz.: "That the "master owes an absolute duty to his employes to furnish "them with reasonable, suitable, and safe machinery and "other appliances with which they are required to do "their work, or with which they may come in contact "while doing their work; and this duty being one which "the company is bound to perform, it cannot be excused "from its performance by intrusting it to an employe "or officer who may neglect to perform such duty."

King *vs.* Railroad Co., 11 Biss., 362.
O'Neil *vs.* Railroad Co., 3 McCrary, 432.
Hough *vs.* Railway Co., 100 U. S., 213.
Sanborn *vs.* Madera Flume Co., 70 Cal., 265.
Beeson *vs.* Green Mountain Co., 57 Cal., 26.
Baxter *vs.* Roberts, 44 Cal., 187.
McNamara *vs.* McDonough, 102 Cal., 575.
Brabbitts *vs.* Railway Co., 38 Wis., 289.
Porter *vs.* Railroad, 60 Mo., 160.
Railroad Co. *vs.* Fitzpatrick, 31 Ohio St., 479.
Fuller *vs.* Jewett, 80 N. Y., 46.
Drymala *vs.* Thompson, 26 Minn., 40.
Railway Co. *vs.* Jackson, 55 Ill., 492.

Many other cases might be cited to the same point, and few, if any, well considered cases hold a contrary doctrine.

It is also the further duty of the master to keep the machinery, apparatus, and other appliances to be used by its employes in a reasonably safe and proper condition for use, and that the duty to do so cannot be delegated to any agent, employe or officer, so as to relieve himself of such duty. This rule differs from that adopted in England and in Massachusetts and some other States, but it is in accord with the decisions of the Court of Appeals of New York, most of the other States and of the Supreme Court of the United States. See cases above cited, and Davis *vs.* Railroad Co., 55 Vt., 84; Wharton Ag., Sec. 232; Pierce R. R., 370; Crispin *vs.* Babbitt, 81 N. Y., 516; Dana *vs.* New York Cent. Ry., 92 N. Y., 639. The proposition that the master is not liable for the negligence of one of his employes or servants, whose duty it is to assist in adjusting and putting in working order a machine or other appliance which is to be used in doing his work, is sustained alone by the English and Massachusetts decisions, or by the Courts which have adopted the rule laid down by these Courts, and are all in conflict with the decisions of the Courts noted above. The English and Massachusetts cases all go upon the ground, if carried out logically, that the master is not bound absolutely to furnish his employes with reasonably safe and perfect machinery or appliances with which to do their work, but that his duty ends when he has provided suitable material out of which the machinery or appliances may be constructed and then employs competent persons to construct and keep them in repair, and that negligence in the construction and keeping in repair in such case is the negligence of a co-employe,

for which the master is not liable; whereas, the Courts following the rule of the Federal Courts hold that the duty of the master does not cease until the machinery or appliances to be used by his employe are put in a safe condition for use, and then constantly kept in such safe condition, and that the employe, whose duty it is to see that such machines and appliances are properly constructed and put in safe condition for use, and to keep them in such condition, in this respect represents the master, and his negligence in the performance of his duty is the neglect of the master, for which the master is liable, although such employe may in other respects be the co-employe of the person injured by such negligence.

The line of distinction is clear; the master is not liable for the negligent use of such machinery or appliances by his employes, from which negligent use an injury happens to a co-employe; but he is liable for neglect in furnishing reasonably safe machinery and appliances for the use of his employes, and to keep them in such safe condition.

"To provide machinery and keep it in repair, and " to use it for the purpos efor which it was intended, are " very distinct matters. They are not employments in " the same common business tending to the same common " result. The one can properly be said to begin only " where the other ends. The servant has no more re- " sponsibility over the repairs than of the purchasing. " The employer assumes the responsibility that the work " shall be done with due care; and as the responsibility " continues so long as the means are used, so must the

"same care be exercised in keeping the required means in "the same condition as at first. * * * In the repair "of the machinery the servant represented the master in "the performance of his part of the contract, and there- "fore his negligence in that respect is the omission of the "master or employer, in contemplation of law."

Shanny *vs.* Androscoggin Mills, 66 Me., 420.

As to those servants who are engaged in making repairs upon appliances, they are as much representatives of the master as those who, in his place, furnish such appliances in the first instance, so far as those employes who are to use them after such repairs have been made are concerned. The duty to furnish reasonably safe appliances includes the care and duty of maintaining them in such condition.

Anderson *vs.* Railway Co., 39 Minn., 523.
Wells *vs.* Coe, 9 Colo., 159.
Miller *vs.* S. P. Co., 20 Or., 285.
Carlson *vs.* Railway Co., 21 Or., 450.

Servants whose duty it is to put up and keep machinery in repair are not fellow-servants with those engaged or employed to use it.

Tudor Iron Works *vs.* Weber, 31 Ill. App. 306.
Holton *vs.* Daly, 4 Ill. App., 25.

Those engaged in supplying and maintaining in repair the premises, ways, appliances and machinery are en-

gaged in a distinct employment from those whose duties are in the use of them, and they are not fellow-servants.

Brann *vs.* Railway Co., 53 Iowa, 597.
Thielman *vs.* Moeller, 73 Iowa, 108.
Roux *vs.* Lumber Co., 94 Mich., 607.

"The two kinds of business are as distinct as the mak-
"ing and repairing of a carriage is from the running
"of it."

Northern Pac. Ry. *vs.* Herbert, 116 U. S., 650.

II.

The Court erred in charging that it was the duty of deceased to apply for a new rope and remedy the defect in the appliance. (Record, pp. 67-68.)

This would impose upon said deceased the duty of inspecting said appliance, and charges him with liability for whatsoever defects or dangers may have lurked therein.

The duty of inspection, we submit, devolved not upon the deceased, but upon the master, and was a personal, positive duty which could not be delegated. Where an employe of the master is called upon to use a machine after its construction is completed, and he is injured by the negligence of those who constructed the same in not constructing it in a suitable and safe manner, the master is liable for such injury; and those who may be employed in helping to construct the machine, and who are afterwards called upon to use it, may hold the master liable for an injury resulting from any neglect or carelessness in its construction, of which he was himself not guilty,

and of which he had no knowledge. The ground of the master's liability rests upon the established rule that it is his duty to inspect and test the machine before it is put into use; and if he puts it into use without such inspection and test, he is liable for an injury resulting from any defects which might have been discovered thereby; and the person engaged in the construction of such machinery or who is directed to operate the same, who is not in fault himself and has no knowledge of any negligence of his co-employee in such work, has the same right as any other employee of the master to demand of him that he shall do his duty in regard to making such inspection and tests before he shall be called upon to use the machine in doing other work for the master. "Due care requires the mas-
"ter, especially in the use of dangerous appliances, either
"himself or by some other selected for that purpose—in
"either case, one competent and qualified—to inspect and
"look after the condition of such appliances and see that
"they are kept in repair."

Northern Pacific *vs.* Herbert, 116 U. S., 652.

This duty, when the character of the business is such as to require it, is imperative, and must be continuously and positively performed.

Brann *vs.* Railway Co., 53 Iowa, 595.
Bessex *vs.* Railway Co., 45 Wis., 477.

The employer is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reason-

able and careful inspection and repair, as will keep the implements which the employe is required to use in such a condition as not unnecessarily to expose him to unknown and extraordinary hazards. The consequences of a negligent performance of that duty must, no matter to whom it may be committed, be visited upon the employer, and not upon the employe who has suffered injury.

Bailey on Masters' Liability, p. 278.
Louisville Ry. *vs.* Buck, 116 Ind., 566.
Cincinnatti Ry. *vs.* McMullen, 117 Ind., 439.

The law charges the master with knowledge of that which he ought to have known, and he ought to know that which, by the exercise of due and reasonable care, he would have discovered.

Wedgwood *vs.* Railway, 41 Wis., 478.

More certain and vigorous methods, more constant and vigilant care, are required in inspecting and testing such appliances as, by constant use, are likely to become defective and out of repair, especially in dangerous employments, than machinery and appliances that are not obviously dangerous, and, from their nature and construction, not likely to become defective or out of repair. Some parts require more frequent and more rigid inspection and watchfulness than others, and different tests in character must be applied to different parts. The failure of the master to inspect renders him thereby liable if it appears, from the nature of the business, the manner of the use of the appliance and the character of the appli-

ance itself, that the master, in the exercise of ordinary care, should have seen the necessity of such precaution of inspection.

Lafflin *vs.* Buffalo Ry., 106 N. Y., 140.
Morgan *vs.* Hudson River Ore Co., 133 N. Y., 666.

Reason and experience unite in affirming that an owner does not exercise even ordinary care who gives no attention to the effect upon ropes, belts, timbers or the like, which is produced by the wear of continued use.

Indiana Car. Co. *vs.* Parker, 100 Ind., 193.
Rapho *vs.* Moore, 68 Pa. St., 404.

The case of Johnson *vs.* Spear, 76 Mich., 139, is very similar to the case at bar. Plaintiff was employed to assist in unloading coal from defendant's vessel by means of a hoisting apparatus like the one now in controversy. With the engine, and as a part of the appliance used for hoisting coal, and furnished by defendant, was a chain about thirty feet long. The links were five-eighths to seven-eighths inch round iron when the chain was new. One end of the chain was made fast to a drum, the other end being fastened to a rope, which ran through pulleys fastened blocks in the rigging of the vessel, nearly over the hatchways, and to this rope the buckets were attached, which were filled in the hold of the vessel and drawn up by the engine to the platform.

Defendant testified that it was his place to buy new chains when the old ones were worn out; that he was to be notified of the need of the same; that he received no

notification previous to the time of the breakage, and had no knowledge of any defect in the chain which would render it insufficient for the business for which it was used. It appeared that he had bought five new chains, and never but one personally.

Plaintiff was in the hold of the vessel, shoveling coal into a bucket, when, in hoisting the bucket, the chain broke, and the bucket fell into the hold and injured him. Plaintiff claimed that the chain was so worn as to become weakened and dangerous for the purpose, and that it was the defendant's duty not only to furnish in the first instance safe machinery and appliances to do the work of hoisting, but it was his duty to inspect the machinery and appliances and see that it remained safe and sufficient for the use to which it was applied; that the defendant neglected this duty, and by reason of such neglect the plaintiff was injured. Defendant was held liable.

The Court said: "The master must exercise reasonable "and proper wachfulness as to the condition of the appli- "ances and guard against dangers liable to arise from "ordinary wear and use, from which they may become "weakened or unfit for the purpose for which they are "supplied.

"The care required necessarily has relation to the "parties, the business in which they are engaged, the "wear and tear upon the machinery, and the varying "exigencies which require vigilance and attention con- "forming in amount and degree to the circumstances of "each particular case. It is not necessary, in order to "recover for injuries arising from defective machinery,

" that the master had actual knowledge of such defects,
" but it is enough to show such facts and circumstances to
" exist that, if he had exercised reasonable care and dili-
" gence, he would have ascertained its true condition by
" examination and inspection. In such case, it is said that
" he ought to have known its condition, and he is held to
" be as equally liable as if he had known it.

" The testimony also showed that, in the ordinary work
" of unloading, the men were obliged to work during the
" early part of the unloading directly under the ascend-
" ing buckets, and the nature of their employment and
" the requirements of their employers would not permit
" them to stand and watch the ascending bucket until it
" was safely landed upon the platform or its contents
" emptied. Consequently their position was one of dan-
" ger, unless the machinery and appliances for hoisting
" were kept safe. Under these circumstances, I think the
" duty of examination and inspection rested upon the de-
" fendant, and that he would be liable if he knew, or could
" have known by inspection, of the weak, worn and in-
" sufficient condition of the chain, through which any
" injury resulted to the men engaged in unloading the
" vessel."

To the same effect—Johnson *vs.* Richmond Ry., 81 N. Car., 446—a company is responsible for an injury suffered by an employe through a flaw in the rod of a car brake which might have been discovered by an ordinarily careful inspection, the plaintiff having had no reasonable opportunity to inspect.

In some cases, though he may have had actual knowl-

edge, yet when his duties were such as to cause him to divert his attention from the defect and its danger, and the defect was unnecessarily dangerous, the master may not be relieved from responsibility for the consequences to such servant that are caused by such defect.

Kane *vs.* Railway Co., 128 U. S., 94.

Nadau *vs.* White River Co., 76 Wis., 130.

Hannah *vs.* Connecticut River Ry., 154 Mass., 529, where it was said that even if the plaintiff had knowledge of the defect it was not conclusive evidence of a want of due care on his part for him to get into it if that happened while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged.

In the case now before the Court, the deceased had no opportunity to observe the defective condition of the rope. James McLester testified: "We did not have time to examine the rope when a bucket would come up. You might possibly see it, but you dump them just as quick as you can. As soon as the bucket comes up we are supposed to grab the rope and swing it in just as quickly as we can." (Record, p. 28.)

When the deceased—who had been stationed at the hatch for some time past—changed his employment on the morning of March 13, 1896, and took his place on the staging to perform the duties of dumper, pursuant to the orders of the master, he had a right to assume that the appliances furnished him by his master to perform said duties were safe and suitable.

Speed *vs.* Atlantic Ry., 71 Mo., 303.

Ft. Wayne *vs.* Gildersleeve, 33 Mich., 133.
Cone *vs.* Delaware Ry., 81 N. Y., 206.
Bradbury *vs.* Goodman, 108 Ind., 286.

And such obligation, resting upon the master, to furnish safe appliances, could not be delegated so as to escape liability.

Magee *vs.* N. P. C. Ry. Co., 78 Cal., 437.
Beeson *vs.* Green Mtn. Co., 57 Cal., 29.
Illinois Cent. Ry. *vs.* Welsh, 52 Ill., 183.
Kain *vs.* Smith, 89 N. Y., 375.
McNamara *vs.* McDonough, 102 Cal., 575.

III.

It was error for the Court to charge that the carelessness or negligence of a co-employe in the same general business, in failing to remedy the defective condition of the tub, was not the negligence of the master. (Record, p. 71.)

Under the foregoing authorities it is clearly shown that the duty to furnish, inspect and repair machinery and appliances is a personal, positive duty imposed by law upon the master. If the duty is delegated to a servant, *no matter what his grade or rank in the general service* of the master, the servant becomes for such purpose the alter ego of the master. His act is the master's act; his failure is the master's failure.

Indiana Car Co. *vs.* Parker, 100 Ind., 182.
Wheeler *vs.* Wason Co., 135 Mass., 294.
McKinney on Fed. Servants, Secs. 39, 40.

Finkelstein *vs.* N. Y. C., etc., Ry., 41 Hun., 34.
Moore *vs.* Wabash, etc., Ry., 85 Mo., 588.
Doughty *vs.* Penobscot Co., 76 Me., 143.
Chicago, etc., Ry. *vs.* Ross, 112 U. S., 377.
Mullan *vs.* Phila., etc., Co., 78 Pa. St., 25.
Gunter *vs.* Graniteville, etc., Co., 18 S. C., 262.
Crispin *vs.* Babbitt, 81 N. Y., 516.
Flike *vs.* Boston, etc., R. R., 53 N. Y., 549.
Ford *vs.* Fitchburg R. R., 110 Mass., 240.
McKune *vs.* California, etc., Ry., 66 Cal., 302.
Brown *vs.* Sennett, 68 Cal., 225.
Daves *vs.* Southern Pac. Co., 98 Cal., 21.
Elledge *vs.* Railway Co., 100 Cal., 282.
7 A. & E. Ency of L., 824.

IV.

The Court erred in refusing to charge the jury as follows:

"That it is the duty of the master not only to furnish "safe appliances, but that that duty is a continuing one; "that it is his duty to see that at all times those appli- "ances are kept in reasonably safe condition and that he "is bound to make a proper inspection of those appli- "ances, and that if he fails to make that inspection he is "guilty of neglect; and that where a defect would be "apparent upon a reasonable inspection, and it is allowed "to continue, it is presumed that no inspection is made, "and the master is liable." (Record, p. 74.)

In addition to the authorities cited above, we cite Depper *vs.* Railway Co., 36 Iowa, 52, and Baldwin *vs.* Railway,

68 Iowa, 37: If the defect had existed for a length of time, knowledge may be presumed from this fact alone.

For th foregoing reasons we respectfully submit that the judgment in this case should be reversed.

P. REDDY,
J. C. CAMPBELL and
W. H. METSON,
Attorneys for Plaintiffs in Error.